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No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Coal Act violates the Due Process Clause by imposing liability on Eastern for lifetime retiree health benefits, nearly thirty years after Eastern ceased coal operations, where Eastern neither promised such benefits nor contributed to the financial instability of the UMWA employee benefit plans that led to the Coal Act.

2. Whether the Coal Act violates the Takings Clause by appropriating Eastern's property, in a manner that was unforeseeable at the time Eastern ceased coal operations in 1965, to remedy a problem of financial instability of the UMWA employee benefit plans that Eastern did not cause.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Eastern Enterprises states that it is a Massachusetts business trust and that it has no parent company or non-wholly owned subsidiary.

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner Eastern Enterprises. The Defendants to the proceedings below were Respondents Commissioner of the Social Security Administration, the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The Third Party Defendants to the action below were Respondents Peabody Holding Company, Inc., Coal Properties Corp., and Eastern Associated Coal Corp.

TABLE OF CONTENTS

Questions Presented i

Rule 29.6 Listing ii

Listing of Parties ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

1. Eastern Enterprises and Its Mining Operations .. 2
2. Eastern's Transfer of its Coal Operations 6
3. The Post-1974 Structure and Operation of the UMWA Plans 8
4. Legislative Response to the Decline of the Benefit Plans 11
5. The Terms of the Coal Act 14
6. Assignment of Coal Act Liabilities 16
7. Proceedings Below 17

Summary of Argument 19

Argument 21

I. THE COAL ACT AS APPLIED TO EASTERN VIOLATES THE DUE PROCESS CLAUSE 21

A. The Due Process Clause Requires a Causal Connection Between the Harm Addressed by a Retroactive Statute and the Conduct of the Burdened Parties 22

B. Congress Could Not Rationally Conclude that Eastern Engaged in Conduct Causing Any of the Harm Addressed by the Coal Act 26

C. No Other Reason Justifies the Imposition of Retroactive Liability on Eastern 30

D. The Coal Act as Applied to Eastern Is an Unprecedented Exercise of Arbitrary Government Power 34

II. THE COAL ACT, AS APPLIED TO EASTERN, EFFECTS A TAKING IN VIOLATION OF THE FIFTH AMENDMENT 36

A. As Applied to Eastern, the Coal Act Constitutes a Direct Appropriation of Property Unrelated to Any Harm Caused by Eastern 38

B. The Economic Impact of the Coal Act Is "Out of All Proportion" to Eastern's Experience with the UMWA Benefit Plans 44

C. The Coal Act Drastically Upsets Eastern's Investment-Backed Expectations 46

1. Eastern's Expectations in 1965 47
2. Eastern's Expectations in 1987 49

Conclusion 50

TABLE OF AUTHORITIES

Cases

Agins v. Tiburon, 447 U.S. 255 (1980) 36

Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989) 25

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1958) 26

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 35

Armstrong v. United States, 364 U.S. 40 (1960) .. 20, 36, 41

Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.), 79 F.3d 516 (CA6 1996), *cert. denied*, 117 S. Ct. 682 (1997) ..... *passim*

Concrete Pipe & Prods. v. Construction Laborers Pension Trust., 508 U.S. 602 (O'Connor, J., concurring) ..... *passim*

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) ..... *passim*

Davon, Inc. v. Shalala, 75 F.3d 1114 (CA7), *cert. denied*, 117 S. Ct. 50 (1996) 31, 48

District 29, UMWA v. Royal Coal Co., 768 F.2d 588 (CA4 1985) 10, 29

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) .... *passim*

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 18

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 26

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 36

General Motors Corp. v. Romein, 503 U.S. 181 (1992) .. 35

Hustado v. California, 110 U.S. 516 (1884) 35

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 42

LTV Steel Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478 (CA2), *cert. denied*, 116 S. Ct. 298 (1995) 25

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 22

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Lindsey Coal Mining Co. v. Chater, 90 F.3d 688 (CA3 1996) 31

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 37, 38

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 37

McCarthy v. Parker, 243 Mass. 465, 138 N.E. 8 (1923) .. 47

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) ..... *passim*

Nachman Corp. v. Pension Benefit Corp., 446 U.S. 359
(1980) 4

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 3, 27

Nollan v. California Coastal Comm'n, 483 U.S. 825
(1987) ..... *passim*

Nordlinger v. Hahn, 505 U.S. 1 (1992) 26

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978) 20, 36, 37

Pennell v. City of San Jose, 485 U.S. 1 (1988) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) .. 42

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 22, 24, 26

Railroad Retirement Bd. v. Alton R.R. Co.,
295 U.S. 330 (1935) 25, 26

Romer v. Evans, 116 S. Ct. 1620 (1996) 22

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 40

Sable Communications, Inc. v. FCC,
492 U.S. 115 (1989) 31

UMWA 1974 Pension Trust v. Pittston Co.,
984 F.2d 469 (D.C.C. 1993) 9, 11, 28

UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.
(In re Leckie Smokeless Coal Co.), 99 F.3d 573
(CA4 1996) 25

UMWA Health & Retirement Funds v. Robinson,
455 U.S. 562 (1982) 5, 8, 45

UMWA v. Nobel, 720 F. Supp. 1169 (W.D. Pa. 1989),
aff'd, 902 F.2d 1558 (CA3 1990) 10

UMWA v. Pennington, 381 U.S. 657 (1965) 30

United States v. Carlton, 512 U.S. 26 (1994) 24, 34

United States v. Carolene Prods. Co., 304 U.S. 144
(1938) 31

United States v. Causby, 328 U.S. 256 (1946) 40

United States v. Darusmont, 449 U.S. 292 (1981) 24

United States v. Heinszen, 206 U.S. 370 (1907) 34

United States v. Monsanto Co., 858 F.2d 160
(CA4 1988) 33

United States v. Pewee Coal Co., 341 U.S. 114 (1951) ... 48

United States v. Security Indus. Bank, 459 U.S. 70 (1982) 41

United States v. Sperry, 493 U.S. 52 (1989) 25, 40

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) ..... *passim*

Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948) 4

Wallace v. Jaffree, 472 U.S. 38 (1985) 31

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) ..... *passim*

Weinberger v. Salfi, 422 U.S. 749 (1975) 25

Westervelt v. Gregg, 12 N.Y. 202 (1854) 35

Williams v. Vermont, 472 U.S. 14 (1985) 27

Constitution and Statutes

U.S. CONST. amend. V ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. §§ 1331, 2201(a) 17

29 U.S.C. § 186(c) 3

29 U.S.C. § 1001, *et seq.* 8

29 U.S.C. § 1301(b)(1) 49

Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 3036 (1992) 26

§ 19142(a)(2), 106 Stat. 3037 26

§ 19142(b), 106 Stat. 3037 27

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 ..... *passim*

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S. 1989, 102d Cong., *reprinted in* 137 CONG. REC. S3,020 (1992) 12

H.R. 4210, 102d Cong. §§ 6001-03 (1992) 12

H.R. 776, 102d Cong. §§ 1941-43 (1992) 13, 14

S. Amend No. 2787, *reprinted in* 138 CONG. REC. S10,825-31 (1992) 13

138 CONG. REC. S3259-61 (1992) 12

138 CONG. REC. S10,558 (1992) 13

138 CONG. REC. S10,783 (1992) 14, 28, 30

138 CONG. REC. S10,787 (1992) 14

138 CONG. REC. S17,603 (1992) 14

138 CONG. REC. S17,632 (1992) 30

H.R. DOC. NO. 102-206 (1992) 13

COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992, CONFERENCE COMM. REP., *reprinted in* 138 Cong. Rec. S17,603 (1992) 13

H.R. REP. NO. 102-1018 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472 14

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Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 22

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Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit (Pet. App. A1-A23) is reported at 110 F.3d 150. The Judgment and the Order of the United States District Court for the District of Massachusetts (Pet. App. A24 and A25-A27, respectively) are unreported.

Jurisdiction

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and is reproduced in full in the Appendix to the Brief for Respondents UMWA Combined Benefit Fund and Its Trustees in Opposition to Certiorari.

Statement of the Case

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 (the "Coal Act"), as applied to Eastern Enterprises ("Eastern").

Under the Coal Act—which was enacted nearly 30 years after Eastern ceased all mining activities and transferred all its coal mining operations to a subsidiary—Eastern is retroactively assigned responsibility to provide lifetime health benefits for retired miners who were employed by Eastern for

varying periods of time between 1946 and 1965, and their dependents. As a result, Eastern faces an actuarially projected liability of more than $100 million. This liability has been imposed notwithstanding that Eastern never agreed or promised to provide lifetime health benefits to these former employees or their spouses and children, made all of the specified contributions to the benefit plans it agreed to pay, and had no control over the discretionary benefits provided by the union benefit plans. Moreover, Eastern faces this liability even though its subsidiary made all contributions after 1965 that Eastern would have made, and hence its departure from the coal business did not burden the union benefit plans in any way. Nor did Eastern contribute to the health care funding difficulties that arose decades later that prompted Congress to intervene. The union benefit plans became financially unstable after subsequent labor agreements provided specified benefits that the signatories to more recent agreements ultimately became unwilling to fund.

Set forth below is a detailed statement of the relevant facts regarding the history of the various coal industry retiree health benefit plans for members of the United Mine Workers of America (the "UMWA"), the development and operation of the Coal Act, and Eastern's relationship with both.

1. Eastern Enterprises and Its Mining Operations

Eastern Gas and Fuel Associates (known today as Eastern Enterprises) was organized in 1929 as a Massachusetts business trust. JA 90a.[1] For many years, Eastern has owned Boston Gas Company, New England's largest distributor of natural gas, and Midland Enterprises Inc., a leading barge operator on the nation's inland waterways. *Id.* Until 1965, Eastern also conducted extensive coal operations—primarily in West

[1] As used herein, "JA" refers to the Joint Appendix filed under Sup. Ct. R. 26, and "RA" refers to the Joint Appendix submitted to the United States Court of Appeals for the First Circuit under Fed. R. App. P. 30(a), two additional copies of which have been lodged with the Clerk.

Virginia and Pennsylvania—through its Coal Division. *Id.* During that time, Eastern employed UMWA miners and was a signatory to all collective bargaining agreements between the coal companies and the UMWA between 1947 and 1964. RA 1840-41.

Prior to 1946, the coal companies (including Eastern) provided health care to coal miners through a prepaid, fee-based system funded by payroll deductions.[2] JA 261a. After the creation of the first union health and welfare fund in 1946, the National Bituminous Coal Wage Agreement ("NBCWA") of 1947[3] created the UMWA Welfare and Retirement Fund of 1947 (the "1947 W&R Fund"), a union welfare trust to be managed by three trustees, one appointed by the UMWA, one appointed by the operators, and the third appointed by the first two.[4] RA 618. The agreement did not require the 1947 W&R Fund to provide specific benefits to miners, retirees, or their dependents. Instead, it required each signatory operator to pay a royalty of ten cents per ton of coal produced or sold during the term of the agreement. RA 615. The trustees were charged to administer

[2] In 1946, during collective bargaining negotiations between the UMWA and bituminous coal companies, the UMWA sought the creation of a health and welfare fund for its members. JA 262a. The coal companies rejected the UMWA's request, as a result, the UMWA initiated a strike. *Id.* More than a month into the strike, President Truman directed the Secretary of the Interior to take possession of the coal mines and to negotiate appropriate changes in the terms and conditions of employment with the UMWA. *Id.* The Secretary and the UMWA, *inter alia*, created a medical and hospital fund to provide miners with health benefits to be funded through payroll deductions. JA 263a.

[3] The 1947 NBCWA was negotiated after control of the mines was returned to the mine operators. JA 99a-100a.

[4] The 1947 W&R Fund was the first multiemployer plan organized under Section 302(c) of the Labor Management Relations Act), 29 U.S.C. § 186(c). The "Taft-Hartley Act" was designed in part to respond to demands by the UMWA that all mine owners contribute ten cents per ton of coal produced to "a central welfare fund established by the union." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 n.14 (1981).

the resources to be contributed to the fund by signatory employers, and to establish the various benefits that would be provided, as well as the terms of eligibility. RA 619-20. The 1947 W&R Fund operated on a current year, "pay-as-you-go" basis under which benefits were paid from, and limited by, the available funds from current royalty receipts, rather than from the income from accumulated principal.[5] JA 101a, 264a; RA 619-21.

In 1950, the UMWA and various coal operators (including Eastern) executed a new NBCWA. This agreement established a successor fund, the UMWA Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"), that mirrored the terms of the 1947 W&R Fund and raised the operators' contribution to thirty cents per ton. JA 101a-102a; RA 638-41. Between 1950 and 1974, the 1950 NBCWA was amended from time to time, but the terms and structure of the 1950 W&R Fund remained essentially unchanged. JA 102a. The coal operators were required to make set royalty contributions to the Fund, on a several and not joint basis, "during the life of th[e] [a]greement."[6] RA 640. The 1950 W&R Fund trustees continued to operate the fund on a current year, pay-as-you-go basis. JA 102a. Throughout this period, the trustees maintained a discretionary program, providing health care benefits for miners, retirees, and their dependents, and also providing limited benefits to the widows and dependent survivors of deceased miners and retirees.[7] JA

[5] The employer-appointed trustee initiated litigation to restrain the majority trustees from using this method of financing, but this suit was rejected in *Van Horn v. Lewis*, 79 F. Supp. 541, 546 (D.D.C. 1948).

[6] Since the companies were only obligated to make specific contributions, "by definition, there [could] never be an insufficiency of funds in the plan to cover promised benefits." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 230 (1986) (O'Connor, J., concurring) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980)).

[7] Between 1954 and 1967, widows and dependent survivors received health benefits for a period of 12 months following the death of the miner. RA 913, 923, 943, 976, 1018, 1059, 1091, 1124, 1161, 1187, 1218, 2003-04. From 1967 to 1974, health benefits were provided to such widows and dependent survivors for two or five years, depending on whether the miner was actively employed at the time of his death. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 567 (1982); *see also* RA 2005-06.

104a. The published eligibility criteria and levels of benefits were determined solely by the trustees, JA 104a, and beneficiaries of the plan were specifically told that benefits were not vested and could be revoked at any time by the trustees. RA 103a-107a.

For example, the annual reports of the 1950 W&R Fund from 1951 through 1966 each stressed that all "[b]enefits are subject to termination, revision or amendment by the Trustees *in their discretion at any time*" and that "*[n]o vested interest in the Fund extends to any beneficiary.*"[8] Likewise, the 1950 W&R Fund annual reports for 1956 to 1965 specifically stated: "Each beneficiary is officially notified of this governing provision at the time his [b]enefit is authorized."[9] In fact, the trustees frequently exercised their authority to revise eligibility requirements for 1950 W&R Fund benefits and to alter, rescind, and reduce particular benefits.[10] JA 105a-107a; *see also* John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. VA. L. REV. 633, 642 (1991) ("Benefits were adjusted to comport with available funds and, on

[8] RA 870, 929, 956, 995, 1028-29, 1047, 1080, 1113, 1146, 1191, 1223 (emphasis added). The 1950 W&R Fund annual reports for 1951 to 1954 and 1957 are not included in the record.

[9] RA 956, 995-96, 1028-29, 1047, 1080, 1113, 1146, 1191.

[10] Examples of specific benefits that were reduced or eliminated are set forth at RA 1018, 1021 (terminating, in 1960, health benefits for miners and their dependents if the miners were self-employed or in any way connected with ownership or management of mines); *id.* (terminating, in 1960, health benefits for miners and their dependents if miners were unemployed for one year); RA 1027 (terminating, in 1960, widows' and orphans' benefits for some beneficiaries); RA 1053-54 (reducing, in 1961, pension benefits from $100 to $75 a month); RA 1235, 1238, 1243-45 (temporarily rescinding, in 1950, health benefits for widows and dependent children); RA 1231, 1246 (altering, in 1953, death benefits for widows and dependent children).

occasion, entire categories of beneficiaries lost their eligibility.").

2. Eastern's Transfer of its Coal Operations

In 1963, while the 1950 W&R Fund was operating on a pay-as-you-go basis, Eastern decided to transfer all of its coal-related operations to a new subsidiary, Eastern Associated Coal Corp. ("EACC"). JA 90a-91a. At that point, Eastern had been a signatory to each NBCWA between 1947 and 1964 and had made all of the mandated contributions to the funds—in excess of $60 million. RA 2626. The transfer of all of Eastern's extensive coal-related assets to EACC was complete by the end of 1965,[11] and Eastern's Coal Division then ceased to exist. JA 91a. As Eastern reported to the IRS in its 1966 tax return, EACC "assumed all of the liabilities of [Eastern] arising out of the coal mining and coal marketing operations of [Eastern]."[12] RA 263; *see also* RA 203, 209, 214. In consideration for the transfer of the coal business, Eastern received all of EACC's stock.[13] JA 90a.

Following completion of the transfer of Eastern's coal mining operations, EACC stood in Eastern's shoes for all

[11] In 1966, after Eastern had ceased mining coal and transferred all its coal operations to EACC, the 1950 W&R Fund had a positive balance of $145,021,431. RA 1207.

[12] The Respondents did not submit affidavits or seek discovery below concerning EACC's succession to Eastern's coal-related assets and liabilities. *Compare* JA 90a-97a *with* JA 126a-129a, 218a. While EACC contested whether its assumption of liabilities included those under the Coal Act, JA 142a-148a; RA 2106-09, the district court did not address any factual disputes, nor did it decide whether Peabody has standing to raise them in this action. In any event, there is no dispute that EACC took over Eastern's former coal operations and made all contributions to the 1950 W&R Fund, and its successor plans, that Eastern would have made. RA 1566.

[13] Between 1966 and 1987, Eastern received dividend payments from EACC aggregating more than $100 million as a return on Eastern's contribution of the coal operations to EACC. RA 357, 397, 439, 496, 2188, 2191.

purposes in connection with the former Coal Division.[14] JA 90a-92a. Thus, EACC took over Eastern's contracts with the UMWA and replaced Eastern as a member of the Bituminous Coal Operators Association ("BCOA"), the multiemployer organization that negotiated with the UMWA. RA 211; 1840-41. From 1966 to 1987, EACC was a signatory to the various NBCWAs, RA 1566, 1841, and continued to make all required contributions to the various UMWA health benefit plans, remitting over $233 million to the UMWA funds in satisfaction of its obligations under various NBCWAs. RA 1566, 2626. By 1986, EACC was operating more mines and producing at least as much coal as Eastern had at the time that it created EACC. RA 1566. Throughout this entire period, EACC employed UMWA miners in all of its mines. *Id.*; RA 211-12.

While Eastern continued to hold EACC's stock for some years after its creation, Eastern sold all of its interest in EACC to Peabody Holding Company, Inc. ("Peabody") in 1987. JA 97a. Because Eastern merely transferred EACC's stock to Peabody, EACC retained all the liabilities that EACC had assumed from Eastern in 1966, and that factor was reflected in the price that Eastern received for the EACC stock. RA 216-217. After 1987, EACC continued as a viable mining operation, still employing UMWA miners. RA 1841,

[14] EACC routinely represented in filings with the Securities and Exchange Commission, in disclosures to prospective lenders, and in other contexts that it was the "successor" to Eastern's Coal Division. RA 265, 277, 339, 375, 415, 464, 518, 574. EACC also treated Eastern's former employees as if they had originally been employed by EACC. For example, when federal and state black lung legislation was enacted in the 1970s creating new rights authorizing affected miners to file claims against their former employers, EACC processed and (when appropriate) paid black lung claims of miners who retired from Eastern's Coal Division before the creation of EACC. RA 210-11, 215, 219-20. Similarly, when miners required a record of employment, EACC provided statements and letters of reference showing years of service with "this company" that included pre-1966 years with Eastern's Coal Division. RA 223-24, 236-37.

1843-44.

3. The Post-1974 Structure and Operation of the UMWA Plans

In 1974, almost a decade after Eastern ceased its own coal operations, the 1950 W&R Fund was substantially restructured. In response to the pension funding requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the BCOA and the UMWA entered into a new NBCWA that created four new trusts to replace the 1950 W&R Fund. JA 107a-108a; RA 747-49. Two were pension trusts,[15] and two were benefit trusts. The UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Plan") provided health benefits to miners who retired before January 1, 1976, and their dependents, and the UMWA 1974 Benefit Plan and Trust (the "1974 Benefit Plan") provided health benefits to both active miners and retired miners who retired on or after January 1, 1976, and their dependents (collectively "the Benefit Plans"). RA 747-49.

The 1974 NBCWA provided for the first time that "the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in [the NBCWA]," as distinct from being established by the trustees of the funds. *Robinson*, 455 U.S. at 566. The 1974 agreement was also the first to mention retiree health benefits, and provided for "a Health Services card for life" for retired miners and their dependents. RA 755-59. Nevertheless, like all prior NBCWAs, the 1974 agreement stated that the obligation of the signatory operators continued only "during the life of this [a]greement," RA 749, and beneficiaries were still reminded as late as 1977 that benefits could be suspended

[15] The two pension trusts were the UMWA 1950 Pension Plan and Trust (the "1950 Pension Trust") that provided pension benefits to miners who retired before January 1, 1976, and the UMWA 1974 Pension Plan and Trust (the "1974 Pension Trust") that provided pension benefits to miners who retired after January 1, 1976. RA 756.

or reduced "in the event that the assets [of the Benefit Plans] became insufficient to pay the benefits." RA 1260.

In 1978, the 1974 Benefit Plan was restructured. Following a lengthy strike, the BCOA demanded and won the right for its members to provide health benefits directly to their own active employees and recent retirees who were eligible for benefits from the 1974 Benefit Plan through individual company-sponsored plans. JA 110a, 271a. As a result, the 1974 Benefit Plan thereafter focused on providing health care coverage to those UMWA retirees in the 1974 Benefit Plan whose employers were no longer in the coal business. RA 777-79. The 1950 Benefit Plan remained unchanged. RA 777.

The 1978 NBCWA also contained, for the first time, a "guarantee clause" that essentially obligated signatory operators to increase contributions to the Benefit Plans during the term of the agreement, if and when required, to guarantee sufficient funding for the schedule of medical benefits in the agreement, but only until the expiration of the agreement. RA 779, 787-88. These changes in the 1974 and 1978 NBCWAs altered the contractual obligation from the provision of only specified contributions to the assurance of defined benefits during the term of the contract. The 1978 NBCWA also incorporated the "evergreen clause" that required signatories to make plan contributions as required under the 1978 NBCWA and "any successor agreements thereto" in accordance with the contribution formulas set forth in the agreements. *See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 472 n.1 (D.C.C. 1993). Nevertheless, like all prior NBCWAs, the 1978 agreement also contained language limiting the contributory obligation to the "term of this [a]greement." RA 779; *see also* RA 792. The structure of the benefit provisions of the 1978 NBCWA was incorporated essentially unchanged in subsequent agreements in 1981 and 1984. JA 111a.

In the late 1970s and through the 1980s, a combination of events jeopardized the financial stability of the Benefit Plans. JA 108a-109a, 272a-273a. In addition to increases in health care costs, the consolidation of the coal industry resulted in the withdrawal of a large number of employers from participation in the NBCWAs. RA 1464. Companies that withdrew from participation in the Benefit Plans did not continue to provide coverage to former employees under the individual benefit plans established under the 1978 NBCWA, and the courts confirmed that the obligation of the withdrawing employers to maintain such individual plans was limited to the "term of th[e] [a]greement," *see District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 591 (CA4 1985). These companies also discontinued making contributions to the 1950 and 1974 Benefit Plans. JA 113a, 287a, 300a-301a. Nevertheless, the 1974 Benefit Plan was obligated to provide continuing benefits to miners who had been promised lifetime benefits under the 1974 or later NBCWA, even if their employers were no longer participating in the NBCWAs. *See UMWA v. Nobel*, 720 F. Supp. 1169, 1179-80 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (CA3 1990). As additional coal operators who had signed the 1974 and later NBCWAs ceased maintaining individual plans or contributing to the 1950 and 1974 Benefit Plans, the remaining employers nevertheless agreed in each subsequent agreement to provide guaranteed benefits to the entire class of eligible participants. JA 111a-113a.

By the end of the 1980s, the financial condition of the Benefit Plans had declined significantly. JA 287a-289a. The 1974 Benefit Plan had its first operating deficit in 1987 and ended fiscal 1988 with a net deficit of approximately $18 million. RA 1439-42. Nevertheless, in 1988, the UMWA and the BCOA entered into a new NBCWA which again provided guaranteed benefits to the entire class of participants. RA 827-28. The 1988 agreement also altered the

contribution formula for the 1950 Benefit Plan from a system which relied substantially on a tonnage royalty to one based exclusively on hours worked. JA 343; RA 820-21. This change resulted in a dramatic reduction in total payments into the Benefit Plans, and by 1991 the deficit reported by both Benefit Plans had increased to approximately $88 million.[16] RA 1438.

Ultimately, the trustees commenced several actions seeking to enforce the "evergreen clause" against signatories to the 1978 and 1981 NBCWAs that continued to mine coal, but had not executed the 1984 or 1988 NBCWA. JA 301a. The trustees contended that these operators were obligated to continue making contributions to the Benefit Plans. While one of these actions was ultimately successful, the decision became final after Congress had already enacted the Coal Act. *Pittston*, 984 F.2d at 473-74 (decided on Feb. 2, 1993).

4. Legislative Response to the Decline of the Benefit Plans

As the financial situation of the Benefit Plans deteriorated between 1987 and 1990, the UMWA and the BCOA (including Peabody[17] and its subsidiary, EACC) sought government intervention. RA 1479-81. In 1990, in response to the crisis, then-Secretary of Labor Elizabeth Dole established an Advisory Commission on Mine Workers Retiree Health Benefits (the "Coal Commission"). JA 245a. The task of the Coal Commission was "to focus on health care issues arising from the . . . Benefit Plans and the effects of resolving these issues on the coal industry as a whole." JA 232a. The Coal Commission found that the miners and their

[16] Nearly half of that amount was attributable to the substantial decline in contributions to the 1950 Benefit Plan resulting from the change in the payment formula in the 1988 NBCWA. RA 1438 n.11.

[17] Robert H. Quenon, the President and Chief Executive Officer of Peabody, was the principal negotiator for Peabody in the 1987 transaction with Eastern, RA 2303-04, and was also a member of the Coal Commission. JA 239a.

dependents had legitimate expectations of lifetime health benefits "based on commitments made under the terms of the various [NBCWAs]." JA 340a. The Commission concluded that the financial situation resulted primarily from the increased number of "orphan" retirees whose former employers had left the BCOA, and whose benefits thus had to be paid from the 1974 Benefit Plan. JA 287a. The Coal Commission reached a general consensus that "[c]ontribution obligations should be statutorily imposed on past signatories, . . . possibly reaching back to the signatory class of 1978." JA 304a. The Commission also reviewed two specific funding proposals, including an industry-wide tax, but did not reach "consensus on the question of who should pay for orphans." JA 306a.

In response to the Commission's Report, on November 19, 1991, a bill was introduced by Senator Jay Rockefeller of West Virginia and others. It provided for an industry-wide tax on all ongoing coal operators, including those which had never employed UMWA miners, to fund retiree health benefits provided in the 1988 NBCWA.[18] The bill also proposed that, subject to certain exemptions, an additional "per beneficiary" premium payment obligation be imposed on each entity that had signed the 1978 or subsequent NBCWA agreement, for each miner, and associated beneficiary, for whom the entity was the last coal industry employer.[19]

During limited debate in the Senate, numerous Senators opposed the bill because it imposed a premium payment obligation on all coal operators, even those with no relationship to the Benefit Plans, to "subsidize the BCOA's

[18] S. 1989, 102d Cong. § 9704(g)(1), *reprinted in* 137 CONG REC. S3,020 (1992).

[19] *Id.* at § 9704(g)(1)(C), 9714, 9723(6). The substantive provisions of the bill were subsequently appended to a House of Representatives tax bill (H.R. 4210, 102d Cong. §§ 6001-03 (1992)) which was reported favorably by the Senate Finance Committee, RA 1483-84, and debated in the Senate during the period March 10 to March 13, 1992, *see* 138 CONG. REC. 3259-61 (1992).

private promises." COAL INDUS. RETIREE HEALTH BENEFIT ACT OF 1992 CONFERENCE COMM. REP., *reprinted in* 138 CONG. REC. S17,603 (1992) (attached to statement of Sen. Wallop). Notwithstanding this opposition, the bill was passed by both houses of Congress, but was subsequently vetoed by President Bush on March 20, 1992.[20]

Thereafter, these same provisions were appended to a House energy bill (H.R. 776), and reported favorably by the Senate Finance Committee on June 18, 1992.[21] The energy bill was considered in the Senate on July 29, 1992.[22] On that same date, however, Senator Rockefeller and others offered a comprehensive amendment to the bill which, among other things, deleted the industry-wide obligation.[23] This amendment also for the first time extended the payment obligation to companies, like Eastern, that had been out of the coal mining business for many years and had never signed the 1978 or any later NBCWA.[24] The amendment proposed that Congress make a finding that

> it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry *to identify persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits . . . .[25]

In support of the proposed amendment, Senator Rockefeller explained that it would "stop the practice in which existing companies dump their responsibilities onto the companies that have faithfully kept their commitments," and rested on the "important principle that responsible companies should

[20] H.R. DOC. NO. 102-206, at 1 (1992).

[21] H.R. 776, 102d Cong. §§ 1941-43 (1992).

[22] 138 CONG. REC. S10,558, S10,825-31, S10,782 (1992).

[23] S. Amend. No. 2787, *reprinted in* 138 CONG. REC. S10,825-31 (1992).

[24] *Id.* at § 20143.

[25] *Id.* at § 20142(a)(2) (emphasis added).

bear the cost of these health benefits."[26]

The amendment was adopted, along with the proposed findings, by the full Senate without extensive debate on the same day it was proposed.[27] Thereafter, because the amendment was included in the Senate version of the energy bill but not in the House's version of H.R. 776, a conference committee was convened which adopted the Senate version without any changes.[28] The conference agreement on H.R. 776 was approved by the House on October 5 and by the Senate on October 8,[29] and was signed by President Bush on October 24, 1992.

5. The Terms of the Coal Act

The Coal Act is designed to secure funding for lifetime retiree health benefits which are "substantially the same as" benefits promised in the 1988 NBCWA. 26 U.S.C. § 9703(b)(1). The act does so through two new, private multiemployer health benefit trusts, only one of which, the UMWA Combined Benefit Fund (the "Combined Fund"), is at issue here. The Combined Fund was created by the statutory merger of the 1950 and 1974 Benefit Plans in order to provide health benefits to beneficiaries who were receiving (and were eligible to receive) benefits from those plans as of July 20, 1992. *Id.* at §§ 9702(a), 9703(f).

To finance the Combined Fund, the Coal Act requires the assignment of the Fund's beneficiaries to particular entities that are "conduct[ing] or deriv[ing] revenue from any business activity, whether or not in the coal industry." *Id.* at § 9701(c)(7). The entity must be either a "signatory operator," which the Coal Act defines to include, *inter alia*, "a person which is or was a signatory to a coal wage agreement," *id.* at 9701(c)(1), or a "related person" to a

[26] 138 CONG. REC. S10,783 (1992).

[27] 138 CONG. REC. S10,787 (1992).

[28] 138 CONG. REC. S17,603 (statement of Sen. Wallop).

[29] H.R. REP. NO. 102-1018 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472.

signatory operator.[30]

The Coal Act makes assignments based on a three-tiered hierarchy. *Id.* at § 9706(a). A beneficiary is to be assigned, first, to the signatory operator that both signed the 1978 or later NBCWAs and most recently employed the beneficiary for two or more years. *Id.* at § 9706(a)(1). If no such entity (or related person) remains in business, the beneficiary is assigned to the signatory operator that most recently employed the beneficiary for any length of time if that operator also signed the 1978 or later NBCWA. *Id.* at § 9706(a)(2). Finally, if the beneficiary remains unassigned under the first two tiers, the beneficiary is assigned to the signatory operator that employed the beneficiary "for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." *Id.* at § 9706(a)(3). Once the assignments are made, the Coal Act authorizes the Combined Fund to assess annual health benefit and death benefit premiums[31] on each signatory operator (or related person) based on the number of former employees (and their surviving spouses and dependents) assigned to it. *Id.* at § 9704. Combined Fund beneficiaries for whom none of these assignments can be made are unassigned (or "orphan") beneficiaries, whose health benefits are funded by a transfer of interest earned on funds held by the Abandoned Mine Reclamation Fund, and, if necessary, by an additional annual premium equal to each operator's pro rata share of assigned retirees.[32] *Id.* at §§ 9704(d), 9705(b).

[30] A "related person" is defined broadly to include members of a controlled group of corporations, joint ventures, and several other groupings of companies, as well as successors in interest to any of the above. *See* 26 U.S.C. § 9701(c)(2).

[31] The premiums paid to the Combined Fund are treated as revenues of the federal government in the federal budget, and expenditures are treated as outlays. RA 1817-36.

[32] The Combined Fund's orphan benefits funding account also received a transfer of $210 million from the excess assets of the 1950 Pension Trust. *Id.*; RA 1906. The transfers from external funds have thus far sufficiently

6. Assignment of Coal Act Liabilities

As of October 1, 1994, 98,901 beneficiaries were eligible under the Coal Act for benefits from the Combined Fund. JA 118a; RA 1562. At least 70 percent of these beneficiaries were spouses or dependent survivors of deceased miners. RA 1561. As of October 1, 1994, Respondent Social Security Administration ("SSA") had assigned 71,913 of these beneficiaries to current and former signatory operators, 24,787 beneficiaries were in the "orphan" pool, and 2,201 were pending reassignment. RA 1562. Fewer than 6,740 beneficiaries were assigned to "super-reachback" operators, which are those operators that had last signed a NBCWA prior to 1978. *Id.*

Eastern, one of the super-reachback companies, was assigned over 1,400 beneficiaries as of February 1, 1993. RA 1571. Only 376 of these beneficiaries, or approximately 25 percent, were retired miners who had worked for Eastern between 1946 and 1965.[33] *Id.* The remaining 1,117 beneficiaries, or approximately 75 percent, were spouses or, in a few instances, children of coal industry retirees. *Id.* As a result of these assignments, Eastern was assessed an initial premium of $5,053,310 for a twelve-month period in 1993-94. RA 591. The statute requires that Eastern be assessed annual premiums thereafter for the remaining life of each assigned beneficiary, and Eastern has actuarially projected its total liability to be more than $100 million.[34] RA 592.

As a result of the Coal Act, the signatories to the 1988

provided for all orphan benefits and thus, the Combined Fund has not yet assessed premiums for unassigned beneficiaries. RA 1907.

[33] Of the sample of 399 assignments included in the record, approximately 17 percent of the retired miners worked for Eastern for one year or less, and a substantial number of them for as little as one month. JA 149a-184a.

[34] This estimate is supported by an uncontroverted affidavit submitted by Eastern. RA 591. Presumably relying on the brief submitted by the Combined Fund, the First Circuit noted that the "appellees vigorously contest this figure." Pet. App. A20.

NBCWA, including both Peabody and EACC, "saw a substantial reduction in their health care costs relative to what they would otherwise" have paid under the 1988 NBCWA. COMM. ON WAYS & MEANS, 104TH CONG., DEV. & IMPLEMENTATION OF THE COAL INDUS. RETIREE HEALTH BENEFIT ACT OF 1992, at 34 (Comm. Print 1995). Indeed, during fiscal year 1995, the signatories to the 1988 NBCWA—who otherwise would have been obligated to provide 100 percent of the funding—contributed only 38 percent of the income of the Combined Fund.

7. Proceedings Below

On November 1, 1993, Petitioner Eastern filed suit against the Respondents the Combined Fund, the Combined Fund's trustees, and SSA claiming that, as applied to Eastern, the Coal Act violates due process and constitutes an uncompensated taking of Eastern's property, both in violation of the Fifth Amendment.[35] JA 28a-47a. Eastern also later amended its complaint to contend that, properly interpreted, the Coal Act required that beneficiaries assigned to Eastern by SSA should have been assigned to EACC. JA 45a. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2201(a). On February 1, 1996, the district court rejected Eastern's statutory interpretation argument, and filed a Memorandum and Order on March 30, 1996. Pet. App. A28. By Order dated June 29, 1996, the district court also denied Eastern's motion for summary judgment and allowed Respondents' cross-motions on the constitutional claims, stating that it found persuasive the reasoning of several circuit courts that had addressed the constitutionality of the Coal

[35] In addition, Eastern filed a third party complaint against EACC and its controlling shareholders, Peabody and Coal Properties Corp., for indemnification or contribution with respect to any liability Eastern may have under the Coal Act. JA 15a-27a; *see* 26 U.S.C. § 9706(f)(6). The third party action was stayed pending the decision of the First Circuit. Pet. App. A27.

Act.[36] Pet. App. A26. The district court then entered judgment in favor of Respondents on July 24, 1996. Pet. App. A22.

The United States Court of Appeals for the First Circuit affirmed the district court's decision. The court first rejected Eastern's statutory argument on the ground that the language of the statute requires assignment to Eastern rather than to the subsidiary which continued its former mining operations.[37] Pet. App. A9. With respect to Eastern's constitutional claims, the court concluded that the Coal Act satisfied the Due Process Clause because Eastern had made an implicit commitment to provide lifetime health benefits to miners, and therefore Congress had acted rationally in requiring Eastern to pay for those benefits. Pet. App. A12-A14. Noting that "it would be surprising" to discover a taking violation where no due process violation exists, the court then conducted a brief, ad hoc inquiry into the nature of the economic deprivation at issue and held that Eastern had not suffered a compensable taking in violation of the Fifth Amendment. Pet. App. A19-A23.

[36] If Eastern's constitutional challenge to its Coal Act liability had been successful, the responsibility for paying for the beneficiaries' health benefits would have shifted to the signatory operators, or their related persons, that employed the miners for the next longest pre-1978 time period, *see* 26 U.S.C. § 9706 (f)(3)(A)(ii), and only if no such employers exist would a miner have been designated as an "unassigned beneficiary," or "orphan."

[37] In rejecting Eastern's statutory argument, neither the district court nor the First Circuit considered whether Eastern's interpretation of the statute was necessary to avoid "serious constitutional problems." *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

SUMMARY OF ARGUMENT

I. The Coal Act as applied to Eastern violates the Due Process Clause. Retroactive legislation has long been suspect because it poses special problems of unfairness. For that reason, under *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the retroactive aspects of legislation must be justified independently of the prospective aspects, and any such legislation requiring a person to pay for damages "unrelated to [the person's] conduct" is prohibited by the Due Process Clause. *Id.* at 17, 24-25.

In this case, Eastern played no role in causing the financial instability of the UMWA benefit plans that gave rise to the Coal Act. Eastern did not promise, nor did it cause any UMWA benefit fund to promise, lifetime health benefits to retired miners and their dependents. In fact, such benefits were first included in collective bargaining agreements long after Eastern left the industry. Moreover, by creating a substitute company before leaving the coal business which made all contributions to the benefit funds that Eastern would have made, Eastern did not deny or withdraw a revenue source from any UMWA benefit fund. Indeed, Eastern's *only* connection with any of the individuals assigned to it is that it employed them some thirty to fifty years ago, and that is not a rational basis on which to make Eastern retroactively responsible for their retiree health benefits.

Given that Eastern did not contribute to the funding problem addressed by the Coal Act, it is even more remarkable that the Coal Act reaches back to attach liability after the passage of such an astonishing number of years. While the Court has upheld retroactive periods of several years in prior cases, the Coal Act attaches new liability to relationships between Eastern and former employees that terminated as long ago as 1946, over a half century ago. This very anomaly presented by the Coal Act is reason enough to

view the statute with deep suspicion—particularly in the absence of a nexus between Eastern and the harm addressed by the statute.

In Eastern's case, then, there is no "injury attributable to the operator's business." *Turner Elkhorn*, 428 U.S. at 25, and therefore no rational basis to justify the unparalleled period of retroactivity under the Coal Act. In such circumstances, "the imposition of retroactive liability on [Eastern] for the benefit of [former] employees" is "arbitrary and irrational," and cannot be sustained under the Due Process Clause. *Cf. Connolly*, 475 U.S. at 229 (1986) (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26).

II. The Coal Act effects a taking of Eastern's property without just compensation. The essential purpose of the Takings Clause is to prevent the government from making one citizen pay to remedy a social problem that is none of his creation. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., concurring in part and dissenting in part). As applied to Eastern, the Coal Act violates this fundamental prohibition.

Each of the factors the Court has previously identified as relevant to a takings analysis supports a finding of an uncompensated taking in this case. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). First, the Coal Act directly appropriates Eastern's property to solve a social problem which Eastern did not cause. Eastern did not promise, nor did it cause any UMWA benefit fund to promise, lifetime health benefits to retired miners and their dependents. Moreover, Eastern did not deny or withdraw a revenue source from any UMWA benefit fund because it created a substitute company which made all contributions to the funds that Eastern would have made.

Second, the economic impact of the Coal Act on Eastern,

estimated to be more than $100 million, is enormous, and there is no "proportionality" between Eastern's liability and any contribution Eastern made to the social problem being addressed by the statute. There likewise is no proportional relationship between the expansive benefits mandated by the Coal Act and the relatively modest benefits provided by the UMWA plans in the 1950s and 1960s.

Finally, the Coal Act has interfered with Eastern's investment-backed expectations to an unprecedented degree. Nothing in past federal involvement in the coal industry or in past federal legislation in similar areas could have allowed Eastern to foresee the Coal Act. Thus, Eastern transferred its coal operations to EACC in 1965, and accepted a lower price for EACC's stock in 1987, with the reasonable expectation that Eastern would not bear subsequent burdens in the coal industry unrelated to its own prior conduct.

ARGUMENT

I. THE COAL ACT AS APPLIED TO EASTERN VIOLATES THE DUE PROCESS CLAUSE.

As described above, the Coal Act imposes a new and unforeseeable liability on Eastern to provide lifetime retiree health benefits to former employees whose relationship with Eastern terminated between thirty and fifty years ago. There is no sense, however, in which Eastern is responsible for causing the need for medical care in retirement. Nor did Eastern undertake or promise to provide lifetime health benefits to miners in the 1950s or early 1960s, or contribute to the financial instability of the UMWA Benefit Plans in the 1980s and early 1990s that the Coal Act was designed to address. Thus, the Coal Act imposes liability which is unparalleled in the span of its reachback period and in its lack of any causal connection to Eastern's conduct. While Congress has broad authority to adjust the burdens of economic life, this is the exceptional case in which Congress

has overstepped the bounds of its power—even under the meager rationality standard necessary to sustain all legislation. As the Court noted in a different context, "[i]t is not within our constitutional tradition to enact laws of this sort."[38] *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

A. The Due Process Clause Requires a Causal Connection Between the Harm Addressed by a Retroactive Statute and the Conduct of the Burdened Parties.

This Court has long recognized that the Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). While Congress is not prohibited from imposing new liability for conduct that has previously been completed, the Court "has never 'intimated that Congress possesses unlimited power to readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations.'" *Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (quoting *Turner Elkhorn*, 428 U.S. at 16). To the contrary, the Court has stated that retroactive civil legislation[39] must be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). The "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17. More specifically, the Court noted in *Turner Elkhorn* that, when Congress imposes burdens retroactively, the rationale that the statute is designed

[38] *See* Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 (providing a detailed history of the constitutional treatment of retroactive civil legislation).

[39] As noted by the First Circuit, there can be little argument that the Coal Act imposes retroactive liability on Eastern, in that it "attaches new legal consequences to events completed before its enactment." Pet. App. A11 (citing *Landgraf*, 511 U.S. at 270).

to regulate or punish bad conduct is normally unavailable and hence the statute must be justified on some other basis. *Id.* at 17-18 ("[W]e would . . . hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness [for intentional wrongdoing].").

In *Turner Elkhorn*, several coal mine operators challenged the facial constitutionality of the Black Lung Benefits Act of 1972, which required coal operators to provide benefits to former miners suffering from pneumoconiosis (so-called "black lung disease"). *See id.* at 8-9, 12, 14-15. The operators contended that requiring the payment of benefits for miners who left employment in the industry before the effective date of the Black Lung Benefits Act was arbitrary and irrational because it imposed retroactive liability for completed acts that were legally proper and, at least in part, unknown to be dangerous at the time they were completed. *See Turner Elkhorn*, 428 U.S. at 12, 15. Rejecting this argument, this Court held that the retroactive application of the statute served "to spread costs in a rational manner—by allocating to the operator an actual cost of his business . . . ." *Id.* at 24-25. Hence, it was not a violation of due process to "requir[e] an operator to provide compensation for a former employee's death or disability . . . arising out of employment in its mines," regardless of whether the miner left the coal industry before Congress enacted the black lung legislation. *Id.* at 19-20.

In reviewing a specific portion of the statute, this Court emphasized in *Turner Elkhorn* the importance of a causal connection between the operator's conduct and the harms addressed by the statute:

> To the extent that the [Black Lung Benefits] Act . . . is viewed as requiring compensation for damages resulting from death *unrelated to the operator's conduct*, its application to employees who terminated their

> employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity . . . The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a "cost" of the operator's business.

Id. at 24-25 (emphasis added). Because the Court found the requisite causal connection, these "difficulties" were not presented and the statute at issue was therefore not invalid under the Due Process Clause. *See id.* at 25-27.

Retroactive legislation has been justified on a basis other than a causal connection between the conduct of the burdened party and the harm addressed by the statute only in limited circumstances. Thus, the Court has approved "short and limited periods [of retroactivity] required by the practicalities of producing national legislation," *see, e.g., United States v. Darusmont*, 449 U.S. 292, 297 (1981) (per curiam); *see also Gray*, 467 U.S. at 730-31, and curative statutes where retroactivity has been reasonably necessary to address a mistake made by the immediately preceding Congress, *see, e.g., United States v. Carlton*, 512 U.S. 26, 32 (1994). The Court has never suggested that, apart from practical necessities such as these, retroactive legislation could be justified except, as in *Turner Elkhorn*, as a means to allocate the costs of a present social harm to the parties whose past conduct caused it. In fact, because the Court has declined to justify retroactive legislation on any ground of deterrence or blameworthiness for intentional misconduct, *Turner Elkhorn*, 428 U.S. at 17-18, the only rational basis for retroactively singling out a group or individual to bear the costs of solving a problem is that the group or individual contributed to the creation of the problem.

Thus, where Congress has retroactively imposed a special

tax[40] or other burden on a particular class—such as a segment of the coal industry—the constitutional standard to be applied is whether Congress could rationally have concluded that each of the parties included in the class contributed to the problem addressed by the legislation. If there is no such causal connection between the parties' conduct and the harm addressed by the statute, the retroactive aspects of the legislation cannot meet the test of due process, and hence the legislation cannot be sustained under the Due Process Clause.[41] *See Turner Elkhorn*, 428 U.S. at 24-25; *Concrete Pipe & Prods. v. Construction Laborers Pension Trust.*, 508 U.S. 602, 647 (O'Connor, J., concurring); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 349-50 (1935) (striking down, as

[40] Eastern notes that the Second and Fourth Circuits have held that Coal Act premiums are taxes because they are an involuntary financial burden imposed by the legislature acting pursuant to the police or taxing power of the government. *See LTV Steel Co. v. Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 498 (CA2) (holding that the premiums are taxes eligible for special priority under the Bankruptcy Code), *cert. denied*, 116 S. Ct. 298 (1995); *UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (CA4 1996) (holding that premiums are taxes under the Declaratory Judgement Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, 26 U.S.C. § 7421).

[41] The need for a causal connection between the conduct of the burdened party and the harm addressed by a statute is also inherent in the equal protection standard applicable to the federal government under the Due Process Clause. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 769-70 (1975). The essence of the equal protection guarantee is that "those who are similarly situated must be similarly treated." Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949). There can be no such reasonable or rational basis for retroactively imposing a special tax or other burden on a particular class unless each of the persons included in the class caused the harm addressed by the statute or, alternatively, will obtain a special benefit as a result of the statute. *See, e.g., United States v. Sperry*, 493 U.S. 52, 64-65 (1989) (holding retroactive imposition of user fee on group of successful claimants who had benefited from tribunal's activities was rational); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.").

violative of due process, a statute requiring railroad carriers to provide pension benefits to recently retired employees.).[42]

B. Congress Could Not Rationally Conclude that Eastern Engaged in Conduct Causing Any of the Harm Addressed by the Coal Act.

It is well settled that Congress need not articulate a legitimate purpose for its legislation so long as one can be rationally conceived. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). On the other hand, where Congress does declare its purpose, or that purpose may clearly be discerned from the nature of the statute or its legislative history, there is no room for speculation on possible other purposes. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 16 n.7 (1992) ("[H]aving themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence.") (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1958)).

In this case, the purpose of the Coal Act was to rescue the UMWA Benefit Plans from financial instability to ensure the continued delivery of health care benefits to the plans' beneficiaries. Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, § 19142(b), 106 Stat. 3037 (1992). In the face of a funding crisis, the Coal Act was intended to ensure that the Benefit Plans would be able to satisfy the defined benefit obligations contained in the 1988 NBCWA by imposing a fixed premium obligation on companies that

[42] The Court in *Turner Elkhorn* declined to overrule *Alton*, noting that *Alton* involved a statute designed to "increase or supplement a former employee's salary to meet his generalized need for funds," and hence was substantially more suspect than the statute involved in *Turner Elkhorn*. *Id.*; *see also Gray*, 467 U.S. at 733-34 (distinguishing *Alton* on ground that it involved a statute creating "pensions for employees who had been fully compensated while working for the railroads.").

purportedly had caused or contributed to the financial instability of the Plans. In order to achieve that goal, Congress concluded that retiree benefits should be funded by those "persons most responsible for plan liabilities." *Id.* at § 19142(a)(2).

Under the due process analysis, the question then becomes whether Congress rationally could have concluded that Eastern was properly includable in the category of persons responsible for the financial instability of the Plans. Under the lens of rational basis scrutiny, legislative classifications are of course allowed some "play in the joints." *Williams v. Vermont*, 472 U.S. 14, 24 n.8 (1985). But Congress exceeds permissible bounds when it imposes extraordinary retroactive liability—reaching back over a period of almost 50 years—based on innocent conduct that did not cause the problem that Congress seeks to remedy. *See Turner Elkhorn*, 428 U.S. at 24-25.

First, Congress could not rationally conclude that Eastern made or caused any UMWA benefit plan to make "promises" of lifetime health benefits. Each of the plans to which Eastern contributed prior to 1966 was a multiemployer plan requiring specified contributions; Eastern paid into the plans according to the number of tons of coal it mined, not according to the amount of money necessary to fund a particular level of benefits—as would be the case for a defined benefit plan. *See generally Connolly*, 475 U.S. at 230 (O'Connor, J., concurring). Eastern did not control the funds contributed to the plans or the benefits promised or paid by the plans. To the contrary, the plans were at all times managed by independent trustees who owed fiduciary duties to the beneficiaries of the plans, rather than to the entities who appointed them. *See generally id.* at 234; *Amax Coal Co.*, 453 U.S. at 331-32. Further, during the time that Eastern contributed to the plans, beneficiaries were specifically told by the plan trustees that benefits were revocable and not

vested. *See supra* note 8 and accompanying text. In fact, the Fund trustees frequently exercised this authority to revise eligibility requirements for benefits and to alter, rescind, and reduce particular benefits both before and after 1965. *See supra* note 9.

Thus, nothing in Eastern's conduct could have led miners to develop a reasonable expectation of lifetime retiree health benefits that would be paid by Eastern. To the contrary, as Justice O'Connor stated in *Connolly*:

> Where [a] plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plan language to the contrary, are not easily traceable to the employer's conduct.

475 U.S. at 235 (O'Connor, J., concurring).

Second, Congress could not rationally have concluded that Eastern's departure from the coal industry in 1965 contributed to the financial crisis that ultimately led to the passage of the Coal Act. Congress enacted the Coal Act because the Benefit Plans were facing a funding crisis that threatened the current ability of the Plans to meet commitments to provide retiree health benefits. According to the principal sponsor of the Coal Act, the crisis resulted from "the practice in which existing companies dump[ed] their responsibilities onto companies that have faithfully kept their commitments." 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller). Assuming that characterization was accurate,[43] it certainly does not apply to

[43] In fact, Senator Rockefeller's statement is not supported by the historical record. With the exception of the decision in *Pittston*, 984 F.2d at 475-76, courts consistently had held that the operators that had ceased maintaining separate plans or contributing to the UMWA benefit plans prior to the 1988 NBCWA had a right to do so. *See, e.g., Royal Coal Co.*, 768 F.2d at 591. Subsequently, the signatories to the 1988 NBCWA knowingly assumed the obligation to fund the benefits specified by that agreement; nothing was "dumped" on these signatories. RA 827-28.

Eastern. Rather than simply withdrawing from the business, Eastern transferred all its coal operations—including the miners formerly employed by Eastern—to a fully capitalized subsidiary, EACC, which continued to operate the same mines (and others), and which made all contributions to the plans that Eastern would have made had it remained in the mining business. *See* RA 1566. Thus, Eastern left the industry without having reduced the number of employers contributing to the UMWA funds, or having withdrawn from a separate funding obligation it had previously agreed to assume, and therefore without having contributed to the problem that prompted Congress to act.

In Eastern's case, then, there is no "injury attributable to the operator's business" that justifies the imposition of liability on Eastern. *See Turner Elkhorn*, 428 U.S. at 25. For purposes of assessing whether a rational basis supports the cost-spreading effected by the Coal Act, the relevant "conduct" is that which connects the employer to "some detriment to the employee." *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring); *Turner Elkhorn*, 428 U.S. at 18-19, 25. The relevant "detriment" or "injury" here is the financial instability of the Benefit Plans that threatened the funding for the benefits provided in the 1988 NBCWA. In this case, Eastern neither promised lifetime health benefits to miners and their dependents nor contributed to the funding crisis that led to the Coal Act. Under such circumstances, Eastern is not among those "most responsible for plan liabilities," and "the imposition of retroactive liability on [Eastern] for the benefit of [former] employees" is "arbitrary and irrational." *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring) (citing *Turner Elkhorn*, 428 U.S. at 19, 24-26).

C. No Other Reason Justifies the Imposition of Retroactive Liability on Eastern.

The First Circuit and the Respondents have offered several bases upon which Congress could rationally have extended the Coal Act to Eastern. Each proffered rationale distorts the contours of rational basis review of retroactive legislation, and also fails to recognize the uniqueness of Eastern's situation.

First, the First Circuit concluded that, even though Eastern had made no promise of lifetime retiree health benefits, Congress had rationally distilled from the historical data an "implicit commitment" by pre-1974 signatories to furnish those benefits. Pet. App. A13. In fact, Congress did not make, nor could it have derived, any such conclusion from the historical record.[44] While Eastern, along with others, including the federal government, participated in the creation of the original UMWA welfare benefit plan, there were no agreements between 1946 and 1965 that ever mentioned or promised lifetime retiree health benefits. The 1950 NBCWA merely established a fund to provide such welfare benefits as the trustees of the fund determined in their sole discretion were desirable and affordable based on the limited contributions that were available to them. That

[44] The principal sponsor of the Coal Act, Senator Rockefeller, did make several statements indicating his belief that during the 1950 NBCWA negotiations the coal operators exacted acquiescence from the union on mine mechanization in return for promises to provide lifetime benefits. 138 CONG. REC. S10,783, S17,632 (1992). Eastern is not aware of any material in the legislative record purporting to support this statement, which is contrary to established historical fact. *See generally UMWA v. Pennington*, 381 U.S. 657, 698 (1965) (Goldberg, J., concurring) (noting that automation to maintain a higher wage standard "has been the articulated policy of the Union since 1933"); *Lewis v. Pennington*, 257 F. Supp. 815, 822 (E.D. Tenn. 1966) (stating UMWA's position that mechanization was not an issue in 1950 negotiations and that the 1950 agreement represented the only understanding between the union and operators that arose out of the negotiations), *aff'd in part and rev'd in part*, 400 F.2d 806 (CA6), *cert. denied*, 393 U.S. 983 (1968); MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS, A BIOGRAPHY 469-89 (1977) (discussing 1950 NBCWA negotiations).

arrangement cannot by itself support a reasonable conclusion that the signatory operators thereby made a commitment, or generated a reasonable expectation, that lifetime health benefits would always be available to miners and their dependents, regardless of whether the cost of such benefits exceeded the amount of contributions that were promised.[45]

While contractual terms do not limit Congress's authority to legislate, *see, e.g., Connolly*, 475 U.S. at 223-24, those terms are the principal determinants of the reasonable expectations of miners employed by Eastern. To suggest that such expectations were implicitly supported in the early agreements (despite the terms of those agreements and the trustees' adjustment of benefit levels to comport with available funds) is to rewrite history. The Court has never held that such a fiction can determine important constitutional rights. *See, e.g., Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("Whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . ."); *cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts have ceased to exist.").

Second, the First Circuit and the Respondents considered it significant that from 1966 to 1987 Eastern received dividends from its then wholly-owned subsidiary, EACC,

[45] Because there is no factual support for the First Circuit's "implicit commitment" conclusion, the court's reliance on other courts of appeals to support its position is misplaced. *See* Pet. App. A13 (citing *Blue Diamond Coal Co. v. Shalala (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 525 (CA6 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688, 694 (CA3 1996); *Devon, Inc. v. Shalala*, 75 F.3d 1114, 1129 (CA7), *cert. denied*, 117 S. Ct. 50 (1996). "[N]o amount of repetition of historical errors in judicial opinions can make the errors true." *See Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

which signed the 1974 and later NBCWAs. Pet. App. A15. This argument entirely misconceives the basis for Eastern's liability under the Coal Act. Eastern has been assigned liability because it employed miners between 1946 and 1965, and not as the parent or a "related person" to EACC.[46] RA 2319-23. The amount of the liability assigned to Eastern would be precisely the same even if Eastern had sold its coal operations in 1965 to an unrelated third party. Moreover, while Eastern did earn dividends on its investment in EACC, the dividend payments did not contribute to the financial crisis affecting the Benefit Plans, nor did they compromise EACC's long term economic viability or threaten its status as a contributor to the Benefit Plans. In fact, between 1966 and 1987, EACC contributed over $233 million to the Plans—more than double the amount realized by Eastern in dividends. RA 2626.

Third, the Combined Fund and the government have argued that the mere fact that a coal company employed miners, and thus "profited" from their labor, is sufficient to justify retroactive liability. *See also Blue Diamond*, 79 F.3d at 523. This conclusion reflects a subtle, but nonetheless fundamental, misunderstanding. *Turner Elkhorn* held that the Black Lung Benefits Act, which imposed retroactive liability to fund benefits for miners with black lung disease, justifiably spread the costs of the injuries redressed by that statute to "those who have profited from the fruits of [the miners'] labor." 428 U.S. at 18. The Court emphasized that this cost-spreading was justified only because black lung disease was an injury sustained as a consequence of the miners' employment, and thus the statute "allocate[d] to the operator an actual cost of his business, the *avoidance* of which might be thought to have enlarged the operator's profits." *Id.* at 24-25 (emphasis added). This case is fundamentally different. Unlike the situation in *Turner Elkhorn*, the Coal Act responds to the

[46] *See* 26 U.S.C. §§ 9701(c), 9706(a).

"generalized need" of the miners for retiree health benefits—a need that is unrelated to the work performed by the miners for Eastern. *See id.* at 25. Moreover, the majority of the beneficiaries (spouses and dependents) never worked in the coal mines at all, and their health care needs cannot be said to spring from employment in the coal industry. In any event, even if Eastern is responsible for some "costs" presently being borne by the Combined Fund, Eastern has not "avoided" those costs because it established a subsidiary which continued to fund the Benefit Plans.[47]

Finally, the Respondents have argued that the retroactive liability imposed by the Coal Act is justified based on an employer's "past conduct of providing service credits to its former UMWA employees [which] directly contributed to the Combined Fund's ultimate liabilities." *See Blue Diamond*, 79 F.3d at 523. This argument, however, mistakenly relies on this Court's reference to "service credits" in *Concrete Pipe*, 508 U.S. at 638, without attention to the context in which the reference was made. The Court in *Concrete Pipe* was addressing the claim that the Multiemployer Pension Plan Amendments Act (the "MPPAA") violated the Due Process Clause because it irrationally assigned liability for unfunded pension benefits to employers contemplating a present withdrawal from a defined benefit pension plan they had voluntarily joined. *Id.* at 637. The Court rejected that argument because the employer had contributed to the plan's "probable liabilities" by providing employees with service credits toward vested pension rights, and the employer had understood, at the time it entered the plan, that it might be responsible for greater liability than was

[47] Similar reasoning distinguishes this case from *United States v. Monsanto Co.*, 858 F.2d 160 (CA4 1988), which upheld retroactive liability under the Comprehensive Environmental Response, Compensation, and Liability Act. *See id.* at 174. Plainly, a company that causes pollution without taking steps to remedy it is avoiding a cost of its business, and retroactive liability for that cost would thus fall squarely within the principles advocated here. *See id.*

attributable to its own employees. *Id.* at 638, 640. In doing so, the Court specifically noted that the company "had no complaint that the MPPAA had been retroactively applied by predicating liability on a withdrawal decision made before the passage of the statute." 508 U.S. at 636. In this case, unlike the employer in *Concrete Pipe*, Eastern made no contribution to the "probable liability" of any UMWA plan for lifetime retiree health benefits, and ceased its participation in the UMWA Plans decades before the passage of the Coal Act.

D. The Coal Act as Applied to Eastern Is an Unprecedented Exercise of Arbitrary Government Power.

Given that Eastern did not contribute to the funding problem addressed by the Coal Act, it is even more remarkable that the Coal Act reaches back to attach liability after the passage of such an astonishing number of years. While the Court has upheld retroactive periods of several years in prior cases,[48] the Coal Act attaches new liability to relationships between Eastern and former employees that terminated as long ago as 1946, over a half century ago. *See* JA 169a, 173a. It is eminently reasonable for an employer like Eastern to believe that finality and repose have long since settled over such relationships. Moreover, Eastern reorganized its corporate structure more than three decades ago, and formed a subsidiary to stand in the shoes of its former Coal Division. Then, a decade ago, Eastern sold the stock of that subsidiary to the largest coal operator in the United States, and the price that Eastern accepted for the stock reflected the reasonable assumption that EACC would fulfill its own obligations, including those to the Benefit Plans. RA 216. Eastern could hardly have anticipated that

[48] *See, e.g., Carlton*, 512 U.S. at 33, 35 (upholding an act retroactively increasing the estate tax rate for prior year); *United States v. Heinszen*, 206 U.S. 370 (1907) (upholding an act ratifying the otherwise unconstitutional collection of tariffs over the preceding eight year period).

Congress would enact legislation that would shift a substantial portion of the obligation voluntarily assumed by current coal operators, such as EACC, to former coal operators such as Eastern.

Under these unique circumstances, the Coal Act is a potent example of the capacity of retroactive legislation to produce "problems of unfairness that are more serious than those posed by prospective legislation, because [retroactive legislation] can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down retroactive state law changing employer's pension plan obligations because it upset settled expectations in violation of the Contract Clause). The very anomaly presented by the Coal Act is reason enough to view the statute with deep suspicion—at least in the absence of a tight causal nexus between the harm addressed by the statute and the persons singled out to provide a remedy for that harm. Given the absence of any such nexus to Eastern, the Coal Act is not rational legislation—it is an exercise in sheer power and expediency. As such, it cannot be sustained under the Due Process Clause of the Fifth Amendment. *See also Hustado v. California*, 110 U.S. 516, 527 (1884) (noting that the Due Process Clause "protect the citizen against all mere acts of power.") (quoting *Westervelt v. Gregg*, 12 N.Y. 202, 212 (1854)).

For the foregoing reasons, the Coal Act as applied to Eastern by SSA violates the Due Process Clause of the Fifth Amendment.

II. THE COAL ACT, AS APPLIED TO EASTERN, EFFECTS A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without

just compensation." U.S. CONST. amend. V. Because the Coal Act subjects Eastern to a staggering assessment that bears no rational relationship to Eastern's experience with the UMWA benefit plans in order to solve a problem that Eastern played no part in creating, application of the Coal Act to Eastern effects a taking of Eastern's property without just compensation, in violation of the Fifth Amendment.[49]

The inquiry under the Takings Clause is guided by the "canonical" principle that the government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *see Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*, 438 U.S. at 123; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). The essence of the Takings Clause "is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." *Pennell*, 485 U.S. at 23 (Scalia, J., concurring in part and dissenting in part).

Although this essential principle is clear, the Court has recognized that applying the Takings Clause to particular situations requires a factual assessment guided by several levels

[49] Relying on dicta in *Connolly* suggesting that "it would be surprising" to "discover now" a takings violation where no due process violation had been found, *see Connolly*, 475 U.S. at 223, the First Circuit erroneously presumed that its finding in the due process context all but necessitated its rejection of Eastern's Takings Clause claim. Pet. App. A19. However, "there is no reason to believe . . . [that] the standards for takings challenges, due process challenges, and equal protection challenges are identical," *Nollan*, 483 U.S. at 834 n.3; *cf.* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607 n.40 (1988); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980).

of inquiry.[50] *Penn Central*, 438 U.S. at 124. The threshold inquiry examines the nature or character of the governmental action, including whether a permanent appropriation has occurred, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), and whether a causal nexus exists between the appropriation and the harm that the government seeks to remedy. *See Dolan*, 114 S. Ct. at 2317; *Nollan*, 483 U.S. at 837-38; Jan G. Laitos, *Takings & Causation*, 5 WM. & MARY BILL RTS. J. 359, 369-372 (1997). Assuming there is a nexus, the analysis typically proceeds to examine the economic impact of the exaction, including whether it is proportional to the property owner's role in causing the social ill addressed by the regulation. *See Penn Central*, 438 U.S. at 124; *see also Dolan*, 114 S. Ct. at 2317; *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 225-26. Finally, it is sometimes appropriate to examine other factors which may justify the uncompensated taking of property by the government, and this portion of the inquiry often centers on whether the property owner should have foreseen the government's interference with its reasonable investment-backed expectations. *See, e.g., Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 226; *cf. Lucas*, 505 U.S. at 1030-31.

Application of these inquiries to the "circumstances of [this] particular case," *Connolly*, 475 U.S. at 224, demonstrates that the Coal Act as applied to Eastern effects an uncompensated taking.

A. As Applied to Eastern, the Coal Act Constitutes a Direct Appropriation of Property Unrelated to Any Harm Caused by Eastern.

The Coal Act effects a permanent appropriation of

[50] The absence of any single line of analysis applicable in all takings cases is caused, at least in part, by the fact that the Takings Clause can apply both to direct appropriations of property, as occurred in this case, or, alternatively, to government regulation of the use of property. *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-1019 (1992).

Eastern's property to remedy a social problem—the financial instability of the UMWA benefit plans—that Eastern played no role in causing. *See, e.g., Loretto*, 458 U.S. at 426; *see also Webb's Fabulous Pharmacies*, 449 U.S. at 163-64. Unlike the situation facing the employers in *Connolly* and *Concrete Pipe*, *see* discussion *infra*, Eastern is not a member of a multiemployer plan whose withdrawal opportunities have been circumscribed by Congress. *See Concrete Pipe*, 508 U.S. at 643; *Connolly*, 475 U.S. at 225. Rather, as applied to Eastern, the Coal Act imposes an involuntary tax or premium obligation upon conduct completed thirty to fifty years ago. Such a permanent appropriation of property requires compensation unless it is based upon and proportional to some connection or "nexus" between the property owner's conduct and the social ill which the appropriation seeks to address. Any contrary rule would grant to government a virtually unchecked power to "load[] upon one [company] more than [its] just share of the burdens of government." *Monongahela*, 148 U.S. at 325; *see Dolan*, 114 S. Ct. at 2317-19; *Nollan*, 483 U.S. at 837; *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *see also Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring in part and dissenting in part). *See generally* Laitos, *supra*, at 369-72.

Recent decisions confirm that the nexus requirement is an essential element of takings analysis. Thus, in *Nollan*, 483 U.S. at 837, the Court held that the California Coastal Commission violated the Takings Clause by conditioning the grant of a building permit to the owners of beachfront property on their grant to the public of a lateral easement across the property. In reaching this result, the Court noted that the condition imposed by the Commission would not alleviate any problems that would be caused by the owners' proposed construction. *Id.* In the absence of any such connection or "nexus" between the exaction sought by the Commission and the problem to be created by the owners'

proposed use of their property, the Court concluded, the only purpose of the condition was to compel the owners alone to contribute toward the achievement of a general social good (public access to beaches). This, the Court held, was impermissible under the Takings Clause without compensation, and therefore the Commission could not condition the grant of the permit on the uncompensated taking. *Id.* at 841-42.

More recently, in *Dolan*, 114 S. Ct. at 2321-22, the Court held that the Planning Commission of the City of Tigard, Oregon, violated the Takings Clause by conditioning approval of a permit application on an insufficiently related exaction. In *Dolan*, the owner of an electric supply store sought to expand the store and pave its parking lot. *Id.* at 2313-14. In exchange for the permit, the Commission required a dedication of portions of the owner's land (i) for a public greenway along a creek in the area to minimize flooding that would be exacerbated by the increase in impervious surfaces associated with the proposed development and (ii) for a pedestrian/bicycle pathway intended to relieve traffic congestion that would be exacerbated by the development. *Id.* In concluding that the exaction effected a taking, the Court first noted that the "nexus" requirement identified in *Nollan* was satisfied because the proposed development would increase impervious surfaces and accompanying flooding in the area, and would also likely increase traffic in the area. *Id.* at 2317-18. The Court held, however, that the conditions were nonetheless invalid under the Takings Clause because the Commission had failed to make any determination or showing that "the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

Although *Nollan* and *Dolan* directly address the limits to government's ability to condition granting a benefit on the relinquishment of a constitutional right, the cases illuminate

the appropriate analysis for all direct appropriation cases. *See* Laitos, *supra*, at 371. Namely, when the government seeks to appropriate the private property of an individual for a public purpose, the Takings Clause requires that the government compensate the property owner unless there is some nexus between the property owner's conduct and the social ill addressed by the appropriation. *See, e.g., Pennell*, 485 U.S. at 21 (Scalia, J., concurring in part and dissenting in part).

The Takings Clause analysis is not different in this case because money rather than real property is the subject of the government exaction. In *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64, for example, addressing a claim that a county's retention of interest earned on an interpleader account violated the Takings Clause, this Court's takings analysis began (and ended) with the question whether there was a "nexus" between the exaction and the "harm" caused to the county by managing the interpleader account on behalf of the creditors. Specifically, the Court held that, in light of the fact that a separate toll was exacted from the interpleader account to pay for county services in managing the account, the further exaction of the interest earned on the account "is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." *Id.* at 163. Analogizing to a land appropriation case, *United States v. Causby*, 328 U.S. 256 (1946), the Court held that the toll was a taking because it "had the practical effect of appropriating for the county the value of the use of the [interpleader] fund."[51] 449 U.S. at 164; *see also Sperry*, 493 U.S. at 59-62 (applying takings analysis to percentage user fee imposed on successful claimants before Iran-United States claims tribunal); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,

[51] Thus, this nexus requirement limits governmental appropriations of money even though money, because of its fungible nature, has been treated different from real and personal property in other contexts, *see Sperry*, 493 U.S. at 62 n.9. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring in part and dissenting in part).

1003-1004 (1984) (trade secrets); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (nonpossessory, non-purchase money liens on personal property); *Armstrong*, 364 U.S. at 44 (materialman's lien).

Even in recent decisions concluding that an uncompensated taking had not occurred, the Court's decisions have been consistent with the necessity of a threshold "nexus" requirement under the Takings Clause. In *Connolly* and *Concrete Pipe*, for example, the Court addressed takings challenges to the MPPAA—a regulatory scheme governing liability upon withdrawal from a pension plan where the "nexus" with the conduct being regulated was readily apparent. The statute was aimed at solving the financial instability caused by employers withdrawing from multiemployer pension plans and leaving unfunded their portions of the plans' vested liabilities. *See Concrete Pipe*, 508 U.S. at 643-44; *Connolly*, 475 U.S. at 225-26. In upholding the MPPAA in each case, the Court followed a takings analysis that implicitly acknowledged the threshold "causation" requirement applied in *Nollan* and *Dolan*.[52] *See Concrete Pipe*, 508 U.S. at 643-46; *Connolly*, 475 U.S. at 225-28; *cf. Pennell*, 485 U.S. at 20-22 (Scalia, J., concurring in part and dissenting in part) (applying "nexus" requirement to a rent regulation ordinance that allowed a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord).

Like the situations in *Nollan* and *Dolan* (and in sharp contrast to those in *Connolly* and *Concrete Pipe*), nothing in

[52] Other portions of the Coal Act, not at issue in this case, are similar to the MPPAA, in that they regulate current or prospective withdrawals by signatories to the 1988 NBCWA from a benefit fund in which they were participants when the Coal Act became law. *See* 26 U.S.C. § 9712(d)(1). While the analysis in *Connolly* and *Concrete Pipe* is fully applicable to such regulation, the portion of the Coal Act challenged in this case is instead a direct appropriation of property which neither bears a relation to past conduct nor regulates current or future conduct.

Eastern's conduct could have led Congress rationally to conclude that Eastern contributed to the financial problems of the Benefit Plans that resulted in the Coal Act. Beneficiaries of the only benefit funds to which Eastern contributed were specifically told that the benefits provided were revocable and not vested. *See supra* notes 7-8, and accompanying text. The 1950 W&R Fund trustees, whom Eastern did not control, had the sole authority to set the level of benefits and frequently exercised that authority to alter, rescind, and reduce particular benefits. *See supra* note 9, and accompanying text. Eastern's sole obligation, which it fully met, was to pay a fixed per ton contribution to the 1950 W&R Fund. RA 2626. By 1965, when Eastern's Coal Division completed its transfer of assets and liabilities to EACC, there were no vested health benefits for miners, let alone their dependents. To the extent that beneficiaries developed an expectation that they were entitled to lifetime health benefits, it cannot be traced to Eastern. That expectation, if it exists at all, is solely the result of the commitment by the signatories to successive NBCWAs after 1974 to finance those plans at designated benefit levels. Moreover, unlike the employers in *Connolly* and *Concrete Pipe*, Eastern did not withdraw from the industry in a manner that deprived any UMWA benefit plan of a previous, dependable funding source. Rather, Eastern's subsidiary took over all of Eastern's mining operations, continued to employ UMWA miners, and continued to make the contributions to the 1950 W&R Fund that Eastern itself would have made.[53] RA 1566, 2626.

[53] It should be noted that, as applied to Eastern, the Coal Act also lacks any "average reciprocity of advantage," a feature that "has been recognized as a justification of various laws." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *cf. Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987). Because Eastern has left the coal business completely, and none of its remaining subsidiaries is coal-related, Eastern gains no legal or economic benefit in exchange for the considerable contribution that the Coal Act requires Eastern to make to the Combined Fund.

Thus, an unprecedented thirty years after leaving the coal industry, the Coal Act essentially forces Eastern to cede its property to solve a social problem—the insolvency of the Benefit Plans as they existed in 1991-92—that it had no role in creating. This essential nature of the Coal Act as applied to Eastern is sufficient by itself to establish a violation of the Takings Clause, regardless of the consideration of any other circumstances. *See Dolan*, 114 S. Ct. at 2317; *Nollan*, 483 U.S. at 837; *Pennell*, 485 U.S. at 21 (Scalia, J., concurring in part and dissenting in part).

B. The Economic Impact of the Coal Act Is "Out of All Proportion" to Eastern's Experience with the UMWA Benefit Plans.

Assuming that some nexus can be divined between the financial crisis of the Benefit Plans and Eastern's conduct thirty to fifty years ago, the next level of inquiry in the takings analysis involves examination of the economic impact of the liability on Eastern. The impact of the Coal Act on Eastern is currently estimated at more than $100 million. However, the size of the liability alone, even though great, does not end the inquiry. For Takings Clause purposes, the most relevant question is whether Eastern's liability is "out of proportion to" Eastern's contribution to the problem which the Coal Act purports to address. This proportionality inquiry does not require a "precise mathematical calculation," *Dolan*, 114 S. Ct. at 2319; instead, the inquiry is guided by the principle that no one should be forced to shoulder more than her "just share" of the costs of government. *See Monongahela*, 148 U.S. at 325. Thus, in *Dolan*, it was necessary that the exactions demanded by the Commission's permit condition be in "rough proportion" to the projected impact of the owner's proposed land use. *Dolan*, 114 S. Ct. at 2319. Similarly, in the regulatory context presented in *Connolly* and *Concrete Pipe*, the Court upheld the MPPAA largely because it imposed liability *only* on employers that withdrew from

multiemployer plans, and *only* to the extent necessary to avoid the underfunding *caused* by each such withdrawal. *Concrete Pipe*, 508 U.S. at 645; *Connolly*, 475 U.S. at 225-26.

In this case, the liability assessed against Eastern is not proportional to any contribution it made to the financial instability of the Benefit Plans. As described above, Eastern neither increased the unfunded liabilities of any UMWA benefit plan to which it contributed nor deprived any plan of any funding source upon which it previously had relied. Nor should Eastern's liability be considered "proportional," as the First Circuit concluded, simply because the Coal Act assigns liability to Eastern in relation to the number of its former employees. Pet. App. A21. To be sure, there is a convenient symmetry in the assignment to each signatory of its own former employees. The measure of proportionality under the Takings Clause, however, is between the *size* of Eastern's liability and the extent of any *contribution* by Eastern to the problem addressed by the statute. *See Dolan*, 114 S. Ct. 2319. Even if Eastern somehow had contributed to the desire of its employees for retiree health benefits, there is no "rough proportionality" between the relatively modest vision of retiree benefits likely in the 1950s and early 1960s and the considerably more expansive benefits mandated by the Coal Act (especially where Eastern has been assigned miners who worked for Eastern for only a very brief period of time).

Indeed, not only does the Coal Act provide benefits that were unknown in the years that Eastern was a signatory, it extends those benefits to a wider range of beneficiaries than under the 1950 W&R Fund. One particular example stands out. The Coal Act provides lifetime health benefits to spouses of miners. In fact, this group collectively comprises a substantial portion of all beneficiaries of the Combined

Fund assigned to Eastern.[34] Yet, the trustees of the 1950 W&R Fund, to which Eastern made contributions, extended health benefits to the spouse of a miner for only a short period following the miner's death. *See supra* note 7, and accompanying text. Eastern does not quarrel with the social desirability of providing lifetime health benefits to miners' spouses in the 1990s. However, it is a fiction to suggest that this class of beneficiaries could have had an expectation of *lifetime* health benefits, particularly because such benefits were not mentioned until the 1974 NBCWA. *See Robinson*, 455 U.S. at 567; *see also supra* note 9. With respect to the beneficiaries assigned to Eastern, therefore, there is no "rough proportionality" between the benefits provided by the Coal Act and Eastern's conduct. *See Dolan*, 114 S. Ct. at 2319. Likewise, Eastern's potential liability for "orphan" beneficiaries bears no reasonable relation to Eastern's conduct. *See. id.* The "orphan" miners, by definition, were not employed by Eastern at all, and in fact may not have worked in the coal industry until after Eastern's departure more than thirty years ago. Thus, had Congress considered the issue, it could not have rationally determined that the liability imposed on Eastern by the Coal Act was proportional to any contribution by Eastern to the funding problems facing the Benefit Plans.

Thus, the proportionality inquiry leads only to the conclusion that the Coal Act as applied to Eastern does not impose a liability on Eastern which is even in rough proportion to Eastern's experience with the plan.

C. The Coal Act Drastically Upsets Eastern's Investment-Backed Expectations.

It remains to consider whether the appropriation of

[34] As set forth above, of the 1,493 beneficiaries assigned and billed to Eastern as of February 1, 1993, only 376 (25%) were actual coal industry retirees. RA 1571. The remaining 1,117 beneficiaries (75%) were spouses or dependent children of such coal industry retirees. *Id.; cf.* RA 1561.

Eastern's property can be justified because the liability imposed by the Coal Act was, as the First Circuit concluded, foreseeable. The First Circuit held that Eastern had "contributed" to miners' expectations in an industry with a pattern of federal involvement, and therefore "Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered." Pet. App. A22. In doing so, the court of appeals fashioned a standard for the examination of "investment-backed expectations" that incorrectly assumes that a general history of federal involvement in an industry is sufficient to justify virtually any appropriation by the government. *See Concrete Pipe*, 508 U.S. at 648-49 (O'Connor, J., concurring).

As shown below, the liability imposed by the Coal Act was entirely unforeseeable, whether judged from the perspective of 1965, when Eastern left the coal business, or even from the perspective of 1987, when Eastern sold EACC to Peabody. As a result, the Coal Act interferes with Eastern's reasonable investment-backed expectations to an unprecedented degree.

1. Eastern's Expectations in 1965

At the time Eastern transferred its coal business to EACC in 1965, Eastern reasonably expected that it would have no further liability to the UMWA plans, and indeed that EACC would stand in the shoes of Eastern for all "financing, liability and operational purposes," including both known and unknown liabilities. RA 214; *see also* RA 203, 209, 263. This independent responsibility of EACC for past and future liabilities was of "great practical importance" to Eastern. RA 214. As a Massachusetts business trust, Eastern understood that its shareholders could be liable for unsatisfied debts of the

trust.[55] In order to attract capital, therefore, it became necessary no later than the 1960s for Eastern to confine operational liabilities to its subsidiaries. RA 214-15. That Eastern's expectations of being insulated from future unknown coal-related liabilities were reasonable is confirmed by the fact that when the Black Lung Benefits Act imposed retroactive liability on coal companies, EACC handled and, when necessary, paid the claims, even with respect to miners who had retired before EACC was created. *See supra* note 14.

Moreover, the NBCWAs reflected the expectation that, once each of the contracts had expired, the operator would have no further contribution obligations. While the terms of the NBCWAs do not themselves constrain Congress's authority to legislate, *see, e.g.*, *Connolly*, 475 U.S. at 223-24, they do present the best available indicator of the parties' contemporaneous expectations. The clarity with which the NBCWAs stated the non-vested and non-guaranteed nature of the benefits provided would have led a reasonable person at the time to expect that the expiration of a NBCWA would mean the end of any obligation arising therefrom. Moreover, during the entire period that Eastern was a signatory to the agreements between 1947 and 1964, there was no existing statute which suggested that mere participation in a specified contribution plan would obligate Eastern to continue to provide benefits to its miners (and their dependents) for life.

The First Circuit was of the view that federal intervention to avoid instability in the coal industry was foreseeable given

[55] The shareholders of a Massachusetts business trust face potential liability every time the trust enters into a contract, and are especially susceptible to liabilities associated with torts or statutory violations of the trust. *See McCarthy v. Parker*, 243 Mass. 465, 467, 138 N.E. 8, 8 (1923) (assuming that the shareholders of a business trust are liable as partners to all creditors who did not contract to look only to the funds of the trust); MASSACHUSETTS CORPORATION LAW & PRACTICE § 17.6, at 559-60 (Richard W. Southgate & Donald W. Glazer eds., 1997) (noting that for this reason trusts often conduct their actual operations through wholly-owned subsidiaries so as to provide an additional level of protection).

the history of federal takeovers of mines and federal intervention in labor disputes. Pet. App. A22; *see also Blue Diamond*, 79 F.3d at 525; *Davon*, 75 F.3d at 1129. Although federal intervention in the coal industry may have been foreseeable, the unprecedented reachback liability and expansive intervention embodied in the Coal Act was not.[56] To the contrary, a company that had transferred its assets and liabilities to a well capitalized subsidiary would not anticipate that it would ever bear subsequent burdens not related to its own prior conduct. Accordingly, viewed from Eastern's perspective in 1965, the Coal Act as interpreted by SSA interferes drastically with Eastern's reasonable investment-backed expectations.[57]

[56] This conclusion is buttressed by the fact that, while the federal government had indeed taken over coal mines at several points during and immediately after World War II, those actions often resulted in successful Takings Clause claims by the coal companies. For example, the Supreme Court held in *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951) (plurality opinion), that a five-month takeover of coal mines during 1943 was "a 'taking' requiring the Government to pay" the coal companies. *Id.* at 119 (Reed, J., concurring). Thus, federal intervention may have been foreseeable in 1965 based on past events, but the legal fallout from those events would have led coal companies to expect that they would be compensated for losses caused by such intervention.

[57] That the Coal Act upsets Eastern's reasonable investment-backed expectations is further highlighted by its dependence on a fortuitous business judgment made a generation ago. The reorganization completed by Eastern in 1965 "pushed down" the Coal Division to EACC as a wholly-owned subsidiary, and thereby detached the business operation which had employed the miners from the formal entity within which the business had operated. Had Eastern foreseen the Coal Act's assignment scheme, it could have elected another form of reorganization which would have maintained the connection between the business operation and the entity. For example, Eastern could have "pushed up" the non-coal operations to a newly formed parent entity, and left the coal operations in Eastern Gas and Fuel as a subsidiary of the new parent. With the sale of the coal subsidiary to Peabody in 1987, the parent would have shed both the entity and the business operation which ultimately produced the Coal Act liability. As a result, the present Eastern family of companies would have avoided any liability under the Coal Act. *See* 26 U.S.C. § 9706.

2. Eastern's Expectations in 1987

Moreover, in early 1987, Eastern had been out of the coal business for over 20 years, but Eastern's independent subsidiary, EACC, then was (and still is) an active coal mining concern. Since EACC was a well capitalized company, Eastern surely could not have expected that it would have any share of EACC's liability after transferring all of EACC's stock to Peabody in 1987. Eastern contemplated, and pointed out to EACC and Peabody during the negotiations, that any liabilities would remain with EACC. RA 216-17. Indeed, the price Eastern received in selling EACC reflected the fact that EACC had previously taken on all of Eastern's known and unknown coal-related liabilities. *Id.* Consequently, if Eastern had considered the possibility of federal intervention in some impending funding crisis, Eastern could not reasonably have foreseen a statute that would impose liability on it. The federal government has only a limited history of regulation of the provision of medical benefits by private benefit plans,[58] and even in the pension arena where ERISA regulates withdrawal liability, the sale of EACC to Peabody would not have resulted in any liability to Eastern.[59] Thus, whether viewed from Eastern's perspective in 1965 or 1987, the Coal Act interferes in an unforeseeable manner with Eastern's investment-backed expectations, so this factor also weighs in favor of finding a taking.

In sum, consideration of the nature of the government action, the lack of proportionality between Eastern's liability

[58] GEN. ACCOUNTING OFFICE, EMPLOYEE BENEFITS: EXTENT OF COMPANIES' RETIREE HEALTH COVERAGE No. GAO/HRD-90-92, at 3 (Mar. 1990).

[59] Under MPPAA, the sale of EACC to Peabody would not have constituted a "withdrawal" for purposes of triggering withdrawal liability. *See* 29 U.S.C. § 1301(b)(1). Eastern and EACC would have been treated as a single employer for purposes of withdrawal liability under ERISA's "common control" test. *Id.*

and its experience with the UMWA funds, and the drastic interference that the Coal Act has wrought on Eastern's reasonable investment-backed expectations leads to the conclusion that the Coal Act's assessment of liability on Eastern effects a taking of Eastern's property without just compensation, in violation of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the Court should declare that the Coal Act, as applied to Eastern, violates the Due Process and Takings Clauses of the Fifth Amendment, and the judgment of the Court of Appeals accordingly must be reversed.

Respectfully submitted,

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